Academic Open Letter in Support of the TRIPS Intellectual Property Waiver Proposal
July 2021

The temporary TRIPS waiver as proposed by India and South Africa and supported by more than 100 countries - is a necessary and proportionate legal measure towards the clearing of existing intellectual property barriers to scaling up of production of COVID-19 health technologies in a direct, consistent and effective fashion. We call on the governments of the United Kingdom of Great Britain and Northern Ireland, Australia, Brazil, Japan, Norway, Switzerland and the European Union to drop their opposition to the TRIPS Waiver proposal at the World Trade Organisation and to support the waiver.

Intellectual Property (IP) rights - including patents, copyrights, trade secrets and other undisclosed information - are not, and have never been, absolute rights and are granted and recognised under the condition that they serve the public interest. IP rights must not be allowed to stand in the way of measures designed to make accessible the health technologies needed to fight the COVID-19 pandemic, where universal global access is essential for the global public good. We acknowledge that legal factors beyond IP, such as trade and export restrictions, also shape the ability to produce and access COVID-19 vaccines and therapeutics. Nonetheless, it is the case that IP rights, and monopolies over tacit and informal information, are also implicated in the current lack of global capacity for vaccine production and other health technologies, as well as in enabling their inequitable distribution.

Current strategies to address the vast inequity in the distribution of COVID-19 vaccines have focused on solutions which build on the existing IP system, such as the World Health Organisation (WHO) COVAX initiative or voluntary licensing provisions. Such proposals have had limited and insufficient success to date at providing vaccines to low- and middle-income countries. We note that as of June 2021 the voluntary COVAX donation scheme has delivered only 90m out of a promised 2bn doses. Pharmaceutical companies who hold relevant IP rights have also failed to engage with the WHO’s voluntary COVID-19 Technology Access Pool (C-TAP) of IP and know-how. Meanwhile, several

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3. The WHO’s proposed COVID-19 Technology Access Pool (C-TAP) C-TAP is aimed at increasing the production of COVID-19 vaccines and other health-technologies globally whilst compensating the IP right
solicitations of collaboration to produce vaccine by companies, such as from Teva in Israel, Biolyse in Canada, Bavarian Nordic in Denmark, and Incepta in Bangladesh, have not engendered a positive response from vaccine IP holding companies. Moreover, the shortcomings of vaccine production are not the only problem: distribution of existing vaccine supply has been profoundly unequal, with pre-purchasing and hoarding of doses by several high-income countries. This has underlined the need for globally distributed, local vaccine manufacturing hubs in low and middle-income countries in order to guarantee sustainable supply.

Given the ongoing absence of sufficient voluntary engagement by the pharmaceutical industry with proposed global mechanisms to share IP rights, data and know-how to address the pandemic, the ability to suspend rules under the TRIPS Agreement is crucial to enable a radical increase in manufacturing capacity, and thus supply, of COVID-19 vaccines. This will facilitate a globally coordinated and transparent pathway to achieve global equitable access. The proposed TRIPS waiver would provide more companies with the freedom to operate in order to produce COVID-19 vaccines and other health technologies without the fear of infringing another party’s IP rights and the attendant threat of litigation.

Furthermore, in light of the considerable public financing of COVID-19 vaccine research, development, production and purchase, claims of inviolability of private IP monopoly rights cannot be justified. The IP system has failed in the past to create market incentives for vaccine development - a finding that is acknowledged and analysed by scholars in the field. In the case of COVID-19 vaccines, such a market failure has been mitigated with unprecedented public funding and de-risking of R&D costs through advance market commitments by governments. These tailored public interventions addressed the


5 The WHO recently announced a new mRNA hub in South Africa but as yet no pharma companies have agreed to take part - <https://www.who.int/news/item/21-06-2021-who-supporting-south-african-consortium-to-establish-first-covid-mrna-vaccine-technology-transfer-hub>

6 ‘Global Health Centre COVID-19 Vaccines R&D Investments’ Graduate Institute of International and Development Studies (21 May 2021) <knowledgeportal.org/covid19-r-d-funding>


8 For example, on the public funding of the Oxford-AstraZeneca vaccine, see S Cross, Y Rho, H Reddy, T Pepperrell, F Rodgers, R Osborne, A Eni-Olotu, R Banerjee, S Wimmer and S Keestra, ‘Who funded the research behind the Oxford-AstraZeneca COVID-19 vaccine? Approximating the funding to the University of Oxford for the research and development of the ChAdOx vaccine technology’ medRxiv (2021) preprint doi: https://doi.org/10.1101/2021.04.08.21255103 – this version posted 10 April 2021. NB: ChAdOx refers to the specific viral vector technology developed at Oxford.
pressing need for vaccine development, and in doing so compensated for the failure of IP incentives on their own to promote vaccine research and development.

The TRIPS waiver is necessary at this time because the existing provisions within the TRIPS Agreement are not sufficient in a pandemic context, whereby global access to vaccines produced at speed and scale is in all our interests. For example, compulsory licence provisions under Art. 31 and Art. 31bis of TRIPS are insufficient to tackle already existing and emerging patent thickets and data exclusivity rules that impede production by manufacturers other than the IP rightsholders. Furthermore, compulsory licences do not address the need for technology transfer and the sharing of know-how needed to build local and regional manufacturing capacity. Building such capacity would enable sustainable solutions for this and future pandemics by increasing domestic/regional manufacturing capacity for vaccine production.

Governments must work with IP holders to make available and incentivise the disclosure of information held as trade secrets (and other undisclosed information) on grounds of Art. 73 (b)(iii) TRIPS, as well as through the strengthening of domestic public interest provisions under Art. 39(3) TRIPS. There are precedents for this, including US production of penicillin in WWII in which the US government oversaw the necessary pooling of technology and knowledge by companies and universities to rapidly increase penicillin production. Last year, the US government used the Defense Production Act to prioritise the production of components for national supply as needed to combat COVID-19.

The proposed TRIPS waiver will enable the temporary suspension of the relevant TRIPS rules for the duration of the COVID-19 pandemic, allowing freedom to operate. It is thus a necessary ingredient as part of a multi-pronged approach to combat the pandemic. This approach must also encompass other steps, including: global co-ordination of supply chains; streamlining regulatory approval processes and sharing exclusive data from regulatory dossiers; and investment in the WHO’s C-TAP and the mRNA technology transfer hub in South Africa. The TRIPS waiver will thus facilitate the technical resilience of lower- and middle-income countries in view of present and future pandemic action and preparedness. This is in line with the commitment in the TRIPS Agreement to balance the rights of IP holders in high-

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income countries with the promise of technology transfer to lower- and middle-income countries. It is time to fulfil this promise and, in so doing, to end the pandemic.

Signed

(In alphabetical order)

1) Prof Isabella Alexander (Professor, Faculty of Law, University of Technology Sydney, Australia)

2) Dr Ana Georgina Alba Betancourt (Researcher, Institute of Legal Research, Universidad Nacional Autónoma de México - UNAM, Mexico)

3) Dr Hanan Almawla (Assistant Professor of Intellectual Property Law, University of Bahrain, Bahrain)

4) Mr Wissam Aoun (Assistant Professor, Faculty of Law, University of Windsor, Canada)

5) Dr Adrian Aronsson-Storrier (Associate Professor of Law, University of Reading, UK)

6) Prof TT Arvind (Professor of Law, University of York, UK)

7) Prof Margo Bagley (Asa Griggs Candler Professor of Law, Emory University School of Law, USA)

8) Prof Rosa Maria Ballardini (Professor of Intellectual Property Law, University of Lapland, Finland)

9) Dr Manuel Becerra Ramirez (Researcher, Institute of Legal Research, Universidad Nacional Autónoma de México - UNAM, Mexico)

10) Prof Jeremy de Beer (Professor, Faculty of Law, University of Ottawa, Canada)

11) Dr Jose Bellido (Reader in Law, Kent Law School, University of Kent, UK)

12) Mr Edwin Bernal Ramirez (Associate Professor, Universidad Militar Nueva Granada, Colombia)
13) Prof Mario Biagioli (Professor, School of Law, University of California at Los Angeles, USA)

14) Prof Michael Birnhack (Associate Dean for Research and Professor of Law, Tel Aviv University, Israel)

15) Dr Enrico Bonadio (Reader in Intellectual Property Law, City, University of London, UK)

16) Dr Catherine Bond (Associate Professor of Law, University of New South Wales, Australia)

17) Prof Maurizio Borghi (Centre for Intellectual Property Policy & Management (CIPPM), Bournemouth University, UK)

18) Dr Jocelyn Bosse (Lecturer in Intellectual Property Law, University of Reading, UK)

19) Prof Kathy Bowrey (Professor in the Faculty of Law, University of New South Wales, Australia)

20) Prof Abbe Brown (Professor of Law, School of Law, University of Aberdeen, UK)

21) Prof Robert Burrell (Professor of Intellectual Property and Information Technology Law, University of Oxford, UK, and Professor of Law, University of Melbourne Australia)

22) Mr Henrique Carvalho (Lecturer in Law, Birkbeck, University of London, UK)

23) Dr Roberto Caso (Associate Professor of Comparative Private Law, University of Trento, Italy)

24) Dr Maurice Cassier (Senior Research Fellow, Director of Research, Centre National de la Recherche Scientifique, Paris, France)

25) Prof Margaret Chon (Donald and Lynda Horowitz Professor for the Pursuit of Justice, Seattle University School of Law, USA)

26) Dr Carys Craig (Associate Professor of Law, Osgoode Hall Law School of York University, Canada)

27) Dr Giuseppina D’Agostino (Associate Professor of Law, Founder and Director of IP Osgoode, Osgoode Hall Law School, York University, Canada)
28) Dr Angela Daly (Reader in Law & Technology, University of Strathclyde, UK)

29) Dr Matthew David (Associate Professor of Sociology, Durham University, UK)

30) Prof Dr Estelle Derclaye (Professor of Intellectual Property Law, University of Nottingham, UK)

31) Dr Gaetano Dimita (Senior Lecturer in International Intellectual Property Law, Queen Mary University of London, UK)

32) Prof Peter Drahos (Professor of Law and Governance, European University Institute, Italy)

33) Dr Rosanna Ducato (Lecturer in IT Law and Regulation, School of Law, University of Aberdeen, UK)

34) Prof Séverine Dusollier (Professor of Law, Sciences Po, Paris, France)

35) Prof Graham Dutfield (Professor of International Governance at the School of Law, University of Leeds, UK)

36) Dr Benjamin Farrand (Reader in Law and Emerging Technologies, Newcastle University, UK)

37) Mr Sean Michael Fiil-Flynn (Director, Program on Information Justice and Intellectual Property American University Washington College of Law, USA)

38) Prof Susy Frankel (Professor, Chair in Intellectual Property and International Trade, Faculty of Law, Victoria University of Wellington, New Zealand)

39) Dr Martin Fredriksson (Associate Professor at the Unit for Culture and Society, TemaQ, Linköping University, Sweden)

40) Prof Gabriel Galvez-Behar (Professor of History, University of Lille, France)

41) Prof Dev Gangjee (Professor of Intellectual Property Law, University of Oxford, UK)

42) Prof Susi Geiger (Professor of Marketing and Market Studies, University College Dublin, Ireland)
43) Prof Gustavo Ghidini (Professor Emeritus, University of Milan and Senior Professor of Intellectual Property & Competition Law, LUISS University, Rome, Italy)

44) Prof Shubha Ghosh (Crandall Melvin Professor of Law, Director, Syracuse Intellectual Property Law Institute, College of Law, Syracuse University, USA)

45) Prof Richard Gold (James McGill Professor, Faculty of Law and Faculty of Medicine, McGill University; Director, Centre for Intellectual Property Policy, Canada)

46) Ms Carolina Gomez (Researcher Centre for Medicines, Information and Power (Universidad Nacional Colombia, Colombia)

47) Prof N S Gopalakrishnan (Honorary Professor, Inter University Centre for IPR Studies, Cochin University of Science and Technology, India)

48) Dr James Griffin (Associate Professor of Law, School of Law, University of Exeter)

49) Dr Paolo Guarda (Assistant Professor in Law, University of Trento, Italy)

50) Dr Olga Gurgula (Lecturer in Intellectual Property Law, Brunel University Law School, UK)

51) Prof Michael Handler (Professor of Law, University of New South Wales, Australia)

52) Dr Naomi Hawkins (Associate Professor of Law, University of Exeter, UK)

53) Prof Robert Howse (Lloyd C. Nelson Professor of International Law, NYU School of Law, USA)

54) Prof Dan Hunter (Professor and Dean of Law, Queensland University of Technology, Australia)

55) Dr Marta Iljadica (Lecturer in Intellectual Property, University of Glasgow, UK)

56) Dr Bronwen Jones (Lecturer in Law, Newcastle Law School, Newcastle University, UK)

57) Dr Hyo Yoon Kang (Reader in Law, Kent Law School, University of Kent, UK)

58) Dr Bernard Keenan (Lecturer in Law, Birkbeck, University of London, UK)
59) Dr Cliona Kelly (Assistant Professor of Law, University College Dublin, Ireland)

60) Prof Martin Kretschmer (Director, CREATE and Professor of Intellectual Property Law, University of Glasgow, UK)

61) Dr Guido Noto La Diega (Associate Professor of IP & Privacy Law, University of Stirling, UK)

62) Prof Graeme Laurie (Professorial Fellow, Edinburgh Law School, University of Edinburgh, UK)

63) Dr Luo Li (Assistant Professor in Law, Coventry University, UK)

64) Dr Phoebe Li (Senior Lecturer in Law and Deputy Director Sussex Centre for Information Governance, University of Sussex, UK)

65) Prof David Lindsay (Professor of Law, Faculty of Law University of Technology Sydney, Australia)

66) Prof Margaret Llewellyn (Professor of Law, University of Sheffield, UK)

67) Mr Oscar Andres Lizarazo-Cortes (Associate Professor of Law, Universidad Nacional Colombia, Colombia)

68) Prof Fiona Macmillan (Professor of Law, Birkbeck, University of London, UK, University of Roma Tre, Italy, University of Technology Sydney, Australia)

69) Prof Hector MacQueen CBE FBA FRSE (Professor of Private Law, University of Edinburgh, UK)

70) Dr Danilo Mandic (Senior Lecturer in Law, University of Westminster, UK)

71) Prof Duncan Matthews (Professor of Intellectual Property Law, Queen Mary University of London, UK)

72) Dr Luke McDonagh (Assistant Professor of Law, London School of Economics, UK)

73) Dr Aisling McMahon (Assistant Professor of Law, Maynooth University, Ireland)

74) Prof Carlos Melini (Professor of Intellectual Property and Director of Intellectual Property LLM, University of San Carlos, Guatemala)
75) Prof Dinusha Mendis (Professor of Intellectual Property & Innovation Law, Bournemouth University, UK)

76) Dr Marc Mimler (Senior Lecturer in Intellectual Property Law, City, University of London, UK)

77) Mr Christopher Morten (Associate Clinical Professor of Law, Columbia Law School, USA)

78) Prof Caroline B Ncube (SARChI Research Chair in Intellectual Property, Innovation and Development, University of Cape Town, South Africa)

79) Mr Murali Neelakantan (Principal Lawyer, Amicus; former Global General Counsel, CIPLA, India)

80) Dr Catherine Ng (Senior Lecturer in Law, University of Aberdeen, UK)

81) Dr Hernán Núñez Rocha (Researcher in Intellectual Property, University of Alcalá, Spain)

82) Dr Eoin O’Dell (Associate Professor in Law, Trinity College Dublin, Ireland)

83) Prof Chidi Oguamanam (Professor of Law, University of Ottawa, Canada)

84) Prof Dr Arzu Oğuz (Head of Intellectual Property Department and Director of Intellectual Rights Research and Application Center, Ankara University, Turkey)

85) Dr Chijioke Okorie (Lecturer, Centre for Intellectual Property Law, Faculty of Law, University of Pretoria, South Africa)

86) Prof Anne Orford (Redmond Barry Distinguished Professor, Michael D Kirby Professor of International Law, ARC Kathleen Fitzpatrick Laureate Fellow, University of Melbourne Law School, Australia)

87) Prof Shobita Parthasarathy (Professor of Public Policy, University of Michigan, USA)

88) Dr Mathilde Pavis (Senior Lecturer in Law, School of Law, University of Exeter, UK)

89) Prof Adoración Pérez Troya (Professor of Commercial Law, University of Alcalá, Spain)
90) Dr Tina Piper (Associate Professor of Law, McGill University)

91) Dr Luis H Porangaba (Lecturer in Intellectual Property Law, University of Glasgow, UK)

92) Mr Gerard Porter (Lecturer in Medical Law and Ethics, Edinburgh Law School, University of Edinburgh, UK)

93) Prof Alain Pottie (Professor of Law, Sciences Po, Paris, France, Professor of Law, University of Kent, UK)

94) Prof Srividya Ragavan (Professor of Law, Texas A&M School of Law, USA)

95) Prof Prabhash Ranjan (Incoming Professor and Vice Dean, Jindal Global Law School, O P Jindal Global University, India)

96) Dr Vicenç Ribas Ferrer (Lecturer in Commercial Law, Universidad de Alcalá, Madrid, Spain)

97) Prof Marco Ricolfi (Professor of Intellectual Property Law, Department of Jurisprudence, University of Turin, Italy)

98) Prof Nagla Rizk (Professor of Economics, The American University in Cairo, Egypt)

99) Dr Agnès Robin (Maitre de Conférences, Université Montpellier, France)

100) Prof Allan Rocha de Souza (Professor and Researcher, Federal University of Rio de Janeiro (UFRRJ), National Institute of Science and Technology (INCT) PROPRIETAS, Brazilian Copyright Institute, Brazil)

101) Dr Amanda Scardamaglia (Associate Professor, Swinburne Law School, Australia)

102) Dr Arul George Scaria (Associate Professor of Law, Co-Director of Centre for Innovation, Intellectual Property and Competition, National Law University, Delhi, India)

103) Dr Sharifah Sekalala (Associate Professor of Law, School of Law, University of Warwick, UK)

104) Prof Brad Sherman (Professor of Law, Australian Research Council Laureate Fellow, University of Queensland, Australia)
105) Dr Alison Slade (Lecturer in Law, University of Leicester, UK)

106) Prof Natalie Stoianoff (Director, Intellectual Property Program, Faculty of Law, University of Technology, Sydney, Australia)

107) Prof Mira T. Sundara Rajan (Visiting Professor, UC Davis Law School, USA)

108) Prof Madhavi Sunder (Professor of Law, Georgetown Law, Georgetown University, USA)

109) Prof Uma Suthersanen (Professor of Global Intellectual Property Law, Queen Mary University of London, UK)

110) Dr Siva Thambisetty (Associate Professor of Intellectual Property Law, London School of Economics, UK)

111) Prof Dr Paul L.C. Torremans (Professor of Intellectual Property Law, University of Nottingham, UK)

112) Mr Martin Uribe Arbelaez (Associate Professor of Law, Universidad Nacional Colombia, Colombia)

113) Dr Florelia Vallejo-Trujillo (Assistant Professor of Law, University of Tolima, Colombia)

114) Prof Dr Geertrui van Overwalle (Professor of Intellectual Property Law, School of Law, University of Leuven, Belgium)

115) Dr Amaka Vanni (Lecturer in Law, School of Law, University of Leeds)

116) Dr Anjali Vats (Associate Professor of Communication and African and African Diaspora Studies at Boston College; Assistant Professor (by courtesy) at Boston College Law School, USA)

117) Prof David Vaver (Emeritus Professor of Intellectual Property & Information Technology Law, University of Oxford, and Professor of Intellectual Property Law, Osgoode Hall Law School of York University, Canada)

118) Prof Yousuf A Vawda (Senior Research Associate, University of KwaZulu-Natal, South Africa)
119) Dr Andrea Wallace (Senior Lecturer in Law, University of Exeter UK)

120) Dr Karen Walsh (Lecturer in Intellectual Property Law, University of Exeter, UK)

121) Prof Kimberlee Weatherall (Professor of Law, The University of Sydney Law School, Australia)

122) Dr Genevieve Wilkinson (Lecturer, Faculty of Law University of Technology Sydney, Australia)

123) Dr Evana Wright (Senior Lecturer, Faculty of Law University of Technology Sydney, Australia)

124) Dr Chen Zhu (Senior Lecturer in Law, University of Birmingham, UK)

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